

NOV 15 1989

FILE COPY

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of)
)
CAPROCK EDUCATIONAL BROADCASTING) File No. BTCEd-891003GF
FOUNDATION)
)
 For Transfer of Control)
 of KLMN(FM), Amarillo, Texas)

To: The Chief, Mass Media Bureau

INFORMAL OBJECTION TO TRANSFER OF CONTROL

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), at Slaton, Texas, by its attorneys and pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3587 of the Commission's Rules, hereby informally objects to the above-referenced application for transfer of control of station KLMN(FM) at Amarillo, Texas, filed by Caprock Educational Broadcasting Foundation (Caprock) on October 3, 1989.

Caprock's application must be denied. First, Caprock improperly has tendered its transfer application on the Commission's short form (FCC Form 316), despite the fact that the proposed transfer involves a substantial change in ownership, requiring the filing of a long-form application. Second, serious unresolved character qualification issues

remain outstanding against Caprock's proposed transferors which mitigate against the grant of any transfer pending resolution. In support whereof, the following is shown:¹

CAPROCK'S APPLICATION IS PROCEDURALLY DEFECTIVE

Caprock's 1989 Ownership Report, as filed with the Commission, divulges that it is a non-profit, non-stock trust, with three trustees. A copy of the Ownership Report is attached hereto as Exhibit 2. Each trustee has voting privileges. *Id.* According to the Report, Caprock's trustees, each with a 1/3 vote, are: T. Kent Atkins, Mary Helen Atkins, and Charles DeLap. *Id.* Caprock's instant application seeks Commission approval, via FCC Form 316, for the replacement of T. Kent Atkins and Mary Helen Atkins with James E. Still and Vera Jo Still.² The application also reflects a change of address for the permittee, from its original location in Bedford, Texas, to the home address of the proposed transferees, Mr. and Ms. Still. *Id.* Accordingly, Caprock proposes a sudden change in 2/3 of its voting ownership composition.

¹Williams is filing, contemporaneously herewith, a Petition to Deny Caprock's proposed transfer of control with respect to Station KAMY(FM) at Lubbock, Texas (BTCED-891003GG). Caprock's application seeks to transfer control of both stations with the same FCC Form 316.

²Williams respectfully requests that Official Notice be taken of the information contained in Caprock's transfer of control application, which is contained in the Commission's files (BTCED-891003GG).

Section 310(d) of the Communications Act of 1934, as amended (the Act), provides that:

No construction permit . . . or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question. .

. . .
47 U.S.C. § 309(d). Section 309 of the Communications Act sets forth the procedures required for the Commission's Section 310 determination of whether the public interest, convenience and necessity will be served by a transfer of control.³ 47 U.S.C. §309; *Transfers of Control of Certain Licensed Non-Stock Entities*, 4 FCC Rcd 3403, 3404 (1989). Although every transfer of control must have prior Commission consent, the full panoply of Section 309 procedures is not mandatory for any transfer of control "which does not involve a substantial change in ownership or control." 47 U.S.C. §309(c)(2)(B); 4 FCC Rcd at 3404.

³The full panoply of procedures required by Section 309 consist of public notice of the transfer of control application, a thirty-day minimum waiting period, an opportunity for opposition and reply, and a hearing on any substantial and material questions of fact. *Id.*

Pursuant to these Communications Act directives, the Commission has established rules governing the filing of transfer of control applications, which are set forth in Section 73.3540 of the Commission's Rules. 47 C.F.R. §73.3540. The rules require that applications for approval of substantial changes in ownership or control be filed on FCC Form 315 (the long form application which initiates the full range of procedures set forth in Section 309 of the Act). 47 C.F.R. §73.3540(d). Where the transfer is insubstantial, however, the Commission only requires the filing of a more abbreviated FCC Form 316 (the short form). 47 C.F.R. §73.3540(f).

The Commission has held that its framework for determining whether a transfer of control has occurred within traditional stock corporations is not always conclusive as to the locus of control of non-stock entities. *E.g. Transfers of Control of Certain Licensed Non-Stock Entities*, 4 FCC Rcd at 3404. However, the Commission has suggested that the existing general guidelines for stock corporations can be adapted to non-stock entities. *Id.* And, despite the Commission's current failure to have a definitive standard for non-stock corporations, the above-cited language in the Communications Act is uncontroverted; the only determination which need be made is whether a particular transfer of control involves a "substantial change." 47 U.S.C. §309(c)(2)(B); 4

FCC Rcd at 3403.

There can be no doubt that Caprock's proposed elimination of 2/3 of its voting membership and replacement of its controlling principals with two others, constitutes a substantial change in ownership under both the Act and the Commission's Rules. The proposed transferees not only are to be vested with voting control over the corporation, but also the corporation's address has been changed to the transferees' home address. The relationship of the transferees as husband and wife underscores the power of their combined 2/3 interest. It is inconceivable that such a transfer of ownership would be deemed insubstantial. Accordingly, Caprock's filing of its application on the Commission's short form -- FCC Form 316, constitutes procedural error, and deprives the public of the opportunity to review the qualifications of the proposed transferees. Accordingly, at minimum, Caprock must be required to re-tender its application on the long form (FCC Form 315) to satisfy the requirements of the Communication's Act. However, as Williams demonstrates herein, even that move should not save Caprock, because the presence of grave outstanding character issues against the ostensible permittee renders it unqualified to be a Commission transferor.

CAPROCK IS UNQUALIFIED TO BE A TRANSFEROR

Even as Caprock slyly seeks to transfer control of Station KLMN, it remains the object of two complaints filed

with the Commission, a field investigation regarding its flagrant disrespect for Commission Rules and Policies, and a petition to deny its pending modification application. The Commission's policy is crystal clear that no assignment of license or transfer of control will be permitted where unresolved character qualifications issues remain outstanding against an assignor or transferor, and the general rule is waived only where "exceptional" equities prevail. *E.g.* *Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C.Cir. 1964); *Happy Valley Radio*, 68 FCC 2d 1516, 1518 (1978). See also *Federal Broadcasting System, Inc.*, 75 FCC 2d 615 (1980). No such exceptions are warranted in the instant case.

Caprock's history before the Commission is characterized by misrepresentations, deceit, bad faith and a blatant disrespect for the Communications Act and Commission's Rules. As detailed in Williams' *Petition to Deny*, filed with the Commission on April 25, 1989, with respect to Caprock's July 26, 1988 construction permit modification application for co-owned station KAMY(FM) at Lubbock, Texas (FCC File No. BMPED-880328MM), from April 10 through April 20, 1989, Caprock commenced operations and began broadcasting from the site proposed in its modification application, absent any authorization from the Commission. Williams' *Petition* followed its filing of a complaint against Caprock on April 13, 1989, a copy of which is appended hereto as Exhibit 1, and

just preceded the Commission's own letter to Caprock, a copy of which is attached hereto as Exhibit 3, acknowledging that Caprock was operating illegally.

Caprock, in its *Opposition to Williams' Petition*, alleged, *inter alia*, that its moves were the result of innocent error. See *Opposition to Petition to Deny*, filed May 9, 1989. However, Williams subsequently discovered that at the time Caprock made that statement, it was continuing to operate FM Broadcast Station KLMN at Amarillo, Texas, unlawfully and without authorization. In its *Reply to Opposition to Petition to Deny*, filed on May 31, 1989, Williams tendered extensive documentation, including photographs and recordings to the Commission, proving without a doubt Caprock's insincerity, misrepresentations, and unauthorized operations with respect to KLMN. Williams' proof, along with a Complaint filed with the Commission on May 25, 1989, a copy of which is attached hereto as Exhibit 4, ultimately resulted in a Commission field investigation against the unauthorized KLMN facility. The field report, the tracking number of which is 89-I-2138 and the control number of which is C5-553, has not yet been completed, but as information already filed with the Commission by Williams has established that in Amarillo, as well as in Lubbock, Caprock's *modus operandi* has been to apply for modification of its permit to the Commission, and then to construct and broadcast

anyway, whether approval has been granted or not.

Almost all of Caprock's filings have been made by T. Kent Atkins, who is one of the 2 principals proposed to be replaced by Caprock's instant application. The other departing principal is his wife. Williams suggests that the reason for their withdrawal is Caprock's hope that the Commission will overlook its transgressions if the offending principals are removed. However, once again, Caprock has failed to employ proper procedures for the action undertaken, and Williams has been forced to monitor the purported permittee to make sure it complies with Commission Rules. Given the nature of Caprock's proposed substitutions the importance of long-form review regarding any proposed substitutions is paramount. Given the history of Caprock's conduct, and the matters still pending regarding it, Caprock's transfer of control application must be denied.

RESPECTFULLY SUBMITTED:


John H. Midlen, Jr.
Gregory H. Guillot

JOHN H. MIDLEN, JR. CHARTERED
3238 Prospect Street, N.W.
Washington, D.C. 20007

November 13, 1989

EXHIBIT 1

FILE COPY

Law Offices
JOHN H. MIDLEN, JR.

Chartered
P.O. Box 5662
Washington, D.C. 20016-5662

(202) 333-1500
Facsimile (202) 699-0194

April 13, 1989

Ms. Edythe Wise, Chief
Complaints and Investigations Branch
Room 8210
Federal Communications Commission
2025 M Street N.W.
Washington, D.C. 20554

RECEIVED

APR 13 1989

Federal Communications Commission
Office of the Secretary

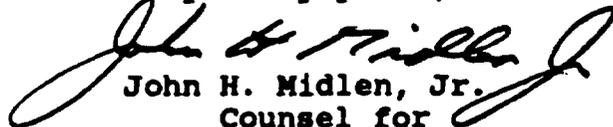
Re: COMPLAINT
Station KAMY(FM), Lubbock, Texas
Caprock Educational Broadcasting Foundation
File No. BMPED-880328MM

Dear Ms. Wise:

Williams Broadcast Group, licensee of Station KJAK(FM), Slaton, Texas, requests that you investigate, and close down, the current operation of Station KAMY(FM), Lubbock, Texas, which station is operated by Caprock Educational Broadcasting Foundation on Channel 211A. Caprock has pending an application for a major change, File No. BMPED-880328MM, which appeared on a March 20, 1989 Cut-Off List. On Monday, April 10, 1989 Station KAMY commenced operation from and with the facilities that constitute its major change application. Among other things, the unauthorized operation is from an entirely different location than is currently authorized. Moreover, we believe current operation to be substantially over power.

It is requested that Station KAMY be contacted, that the information contained herein be confirmed, and that the station be ordered, by telegram, to return to operation from its currently authorized facilities. It is Williams Broadcast Group's intention to file a petition to deny Caprock's modification application on or before the cut-off, April 25, 1989.

Very truly yours,


John H. Midlen, Jr.

Counsel for
Williams Broadcast Group

cc: Station KAMY(FM)

EXHIBIT 2

United States of America
Federal Communications Commission
Washington, D. C. 20554

RECEIVED BY

AUG 09 1989

FCC MAIL BRANCH

Ownership Report

NOTE: Before filling out this form, read attached instructions.

Section 310(d) of the Communications Act of 1934 requires that consent of the Commission must be obtained prior to the assignment or transfer of control of a station license or construction permit. This form may not be used to report or request an assignment of license/permit or transfer of control (except to report an assignment of license/permit or transfer of control made pursuant to prior Commission consent).

I certify that I am T. Kent Atkins, President

(Official title, see Instruction 1)

of Caprock Educational Broadcasting

(Exact legal title or name of respondent)

that I have examined this Report, that to the best of my knowledge and belief, all statements in the Report are true, correct and complete.

(Date of certification must be within 60 days of the date shown in Item 1 and in no event prior to Item 1 date):

T. Kent Atkins
(Signature)

August 1, 1989

(Date)

All of the information furnished in this Report is accurate as of

August 1, 1989

and must comply with Section 31.3018(a), i.e., information must be true within 60 days of the filing of this report, when 1(a) below is checked.

Telephone No. of respondent (include area code):

(817) 498-7001

Any person who willfully makes false statements on this report can be punished by fine or imprisonment. U.S. Code, Title 18, Section 1001.

This report is filed pursuant to Instruction (check one)

1(a) Annual 1(b) Transfer of Control or Assignment of License 1(c) Other

for the following stations:

Call Letters	Location	Class of service
KLMN-FM	Amarillo, TX	FM
KAMY-FM	Lubbock, TX	FM

Name and Post Office Address of respondent:

T. Kent Atkins
Caprock Educational Broadcasting
2921 Brown Trail, Suite 140
Bedford, TX 76021

2. Give the name of any corporation or other entity for whom a separate Report is filed due to its interest in the subject licensee (See Instruction 3):

5. Respondent is:

- Sole Proprietorship
- For-profit corporation
- Not-for-profit corporation
- General Partnership
- Limited Partnership
- Other: Non-Profit Trust

3. Show the attributable interests in any other broadcast station of the respondent. Also, show any interest of the respondent, whether or not attributable, which is 5% or more of the ownership of any other broadcast station or any newspaper or CATV entity in the same market or with overlapping signals in the same broadcast service, as described in Sections 73.3555 and 76.501 of the Commission's Rules.

If a limited partnership, is certification statement included as in Instruction 4?

Yes No

68-11-89

8. List officers, directors, cognizable stockholders and partners. Use one column for each individual or entity. Attach additional pages, if necessary. See Instructions 4, 5, and 6.

Line (Read carefully - The numbered items below refer to line numbers in the following table.)

1. Name and residence of officer, director, cognizable stockholder or partner (if other than individual also show name, address and citizenship of natural person authorized to vote the stock). List officers first, then directors and, thereafter, remaining stockholders and partners.
2. Citizenship.
3. Office or directorship held.
4. Number of shares or nature of partnership interest.
5. Number of votes.
6. Percentage of votes.
7. Other existing attributable interests in any other broadcast station, including nature and size of such interest.
8. All other ownership interests of 5% or more (whether or not attributable), as well as any corporate officership or directorship, in broadcast, cable, or newspaper entities in the same market or with overlapping signals in the same broadcast service, as described in Sections 73.3555 and 76.801 of the Commission's Rules, including the nature and size of such interests and the position held.

1	(a)	(b)	(c)
	T. Kent Atkins 605 Greenmeadow Colleyville, TX	Mary Helen Atkins 605 Greenmeadow Colleyville, TX	Charles DeLap 510 May Street Fort Worth, TX
2	US Citizen	US Citizen	US Citizen
3	Trustee	Trustee	Trustee
4	Voting/Trustee	Voting/Trustee	Voting/Trustee
5	1	1	1
6	1/3	1/3	1/3
7	Southwest Educational Media Foundation of Texas, Inc. KENT-AM Odessa, TX KOFR-FM Odessa, TX The above is a Non-Stock, membership, Non-Profit KRGN-FM Amarillo, TX	Southwest Educational Media Foundation of Texas, Inc. KENT-AM Odessa, TX KOFR-FM Odessa, TX	Southwest Educational Media Foundation of Texas, Inc. KENT-AM Odessa, TX KOFR-FM Odessa, TX
8	Sole Proprietorship		

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT
AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information requested in this Report is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to assess compliance with the Commission's multiple ownership restrictions. The staff, consisting variously of attorneys and examiners, will use the information to determine such compliance. If all the information requested is not provided, processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information. Your response is required to retain your authorization.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974,
5 U.S.C. 552(d)(3) AND THE PAPERWORK REDUCTION ACT P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

5 List all contracts and other instructions required to be filed by Section 73.3 of the Commission's Rules and Regulations. (Only licensees, permittees, or a reporting entity with a majority interest in or that otherwise exercises de facto control over the subject licensee or permittee shall respond.)

Description of contract or instrument	Name of person or organization with whom contract is made	Date of Execution	Date of Expiration
None			

7. Capitalization (Only licensees, permittees, or a reporting entity with a majority interest in or that otherwise exercises de facto control over the subject licensee or permittee, shall respond.)

Class of Stock (preferred, common or other)	Voting or Non-voting	Number of Shares			
		Authorized	Issued and Outstanding	Treasury	Unissued
Non-Stock Trust	Trustees have voting privileges only				

EXHIBIT 3

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

APR 25 1989

IN REPLY REFER TO:

8920-AED

Caprock Educational Broadcasting Foundation
Radio Station KAMY(FM)
2100 Highway 360
Suite 1204
Grand Prairie, Texas 75050

RECEIVED

APR 28 1989

John H. Midlen, Jr., Charterer

In re: KAMY(FM), Lubbock, Texas
Caprock Educational Broadcasting
Foundation
BMPED-880328MM

Dear Applicant:

This refers to the above-captioned major change application to modify construction permit file number BPED-8406261E by increasing effective radiated power (ERP) and antenna height above average terrain (HAAT) and changing transmitter location. On April 13, 1989 the Commission received the enclosed complaint filed on behalf of Williams Broadcast Group, licensee of FM station KJAK(FM), Slaton, Texas which states that KAMY(FM) was operating illegally.

Pursuant to a telephone conversation on April 20, 1989 between your attorney, Mr. James Oyster, and Mr. Arthur Doak of my staff, Mr. Oyster stated that KAMY(FM) was operating from an unauthorized transmitter site (the site proposed in the above-captioned application) but that KAMY(FM) has ceased operation as of April 20, 1989.

This letter is to confirm that KAMY(FM) is not authorized to operate with any facilities other than the facilities authorized in construction permit file number BPED-8406261E and that as of April 20, 1989 KAMY(FM) has ceased unauthorized broadcast operations.

Sincerely,


Dennis Williams
Chief, FM Branch
Audio Services Division
Mass Media Bureau

cc: John H. Midlen, JR., Esq.
James L. Oyster, Esq.

Enclosure

EXHIBIT 4

Law Offices
JOHN H. MIDLEN, JR.

Chartered
P.O. Box 5662
Washington, D.C. 20016-5662

(202) 333-1500
Facsimile (202) 659-8194

May 25, 1989

MAY 25 '89

OFFICE OF THE SECRETARY

Ms. Edythe Wise, Chief
Complaints and Investigations Branch
Mass Media Bureau, Room 8210
Federal Communications Commission
2025 M Street N.W.
Washington, D.C. 20554

FILE COPY

Re: COMPLAINT
Station KLMN(FM), Amarillo, Texas
Caprock Educational Broadcasting Foundation
License File No. BLED-880620KB

Dear Ms. Wise:

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), Slaton, Texas, requests that you investigate, and close down, the current operation of Station KLMN(FM), Amarillo, Texas, owned and operated by Caprock Educational Broadcasting Foundation (Caprock) on Channel 206A. Caprock's authorized transmitter location, as specified in its above-referenced license, is 0.4 kilometers southeast of 34th and Helium Road in Amarillo, Texas, at geographic coordinates North Latitude 35 10 21.0, West Longitude 101 57 13.0. Caprock has pending an application for modification of its construction permit, File No. BMPED-880321IA, seeking authorization to relocate its transmitter and antenna to a location 2.5 miles north of Amarillo on FM 1719, at geographic coordinates North Latitude 35 15 39, West Longitude 101 52 53, and to increase its power and antenna height.¹ However,

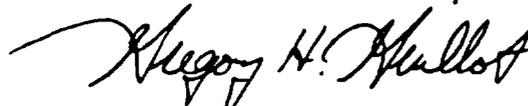
¹Apparently, the proposed location is the same location as that used by FM Broadcast Station KRGH, Amarillo, Texas, on 6000 North Western. See FCC License No. BLH-861125KA. KRGH is licensed to Atkins Broadcasting, owned by Kent Atkins, Caprock's dominant principal. However, Williams notes that the geographic coordinates listed for KLMN's proposed move in its above-referenced application differ from the coordinates listed in KRGH's above-referenced license, although the address and tower are the same. This variance serves as yet another example of Caprock's imprecision and flagrant disregard for the Commission's Rules.

Ms. Edythe Wise
May 25, 1989
Page Two

Station KLMN has commenced operations from and with the facilities described in its modification application. Accordingly, the unauthorized operation is from an entirely different location than is currently authorized. Moreover, we believe current operation to be substantially over power.

It is requested that Station KLMN be contacted², that the information contained herein be confirmed, and that the station be ordered, by telegram, to return to operation from its currently authorized facilities.

Very truly yours,



John H. Midlen, Jr.
Gregory H. Guillot
Counsel for
Williams Broadcast Group

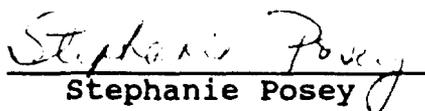
cc: Mr. Dennis Williams
Mr. Arthur E. Doak
James L. Oyster, Esq.

²For the Commission's convenience Williams notes that no telephone listing or address is available for Station KLMN; all communications with the unauthorized facility apparently must be made through the listing available for KRGH; the stations are co-located.

CERTIFICATE OF SERVICE

I, Stephanie Posey, do hereby certify that I have caused to be sent via First Class U.S. Mail (postage prepaid) today, November 13, 1989, a copy of the foregoing INFORMAL OBJECTION TO TRANSFER OF CONTROL, to the following:

James L. Oyster, Esquire
Law Offices of James L. Oyster
Rt. 1, Box 203A
Castleton, Virginia 22716


Stephanie Posey